CONCLUSION

We submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX A

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098–1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54).

Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

APPENDIX B

AMERICAN AUTHORITIES ON THE QUESTION OF CAPACITY OF A WOMAN TO BEAR CHILDREN SO LONG AS SHE LIVES

The following cases involved the rule against perpetuities, it being held that remoteness could not be avoided by allegation, agreement or proof that a woman was, by reason of age, incapable of bearing children:

CONNECTICUT:

White v. *Allen*, 76 Conn. 185 (1903)

DELAWARE:

Taylor v. *Crosson*, 11 Del. Ch. 145 (1916)

INDIANA:

Reasoner v. *Herman*, 191 Ind. 642 (1922)

KENTUCKY:

Beall v. *Wilson*, 146 Ky. 646 (1912)

Brown v. *Columbia Finance & Trust Co.*, 123 Ky. 775 (1906)

Tyler v. *Fidelity & Columbia Trust Co.*, 158 Ky. 280 (1914)

U.S. Fidelity & Guaranty Co. v. *Douglas' Trustee*, 134 Ky. 374 (1909)

MASSACHUSETTS:

Lovering v. *Lovering*, 129 Mass. 97 (1880)

MICHIGAN:

Gettins v. *Grand Rapids Trust Co.*, 249 Mich. 238 (1930)

Rozell v. *Rozell*, 217 Mich. 324 (1922)

MISSOURI:

Loud v. *St. Louis Union Trust Co.*, 298 Mo. 148 (1923)

NEW JERSEY:

Graves v. *Graves*, 94 N.J.Eq. 268 (1923)

Stout v. *Stout*, 44 N.J.Eq. 479 (1888)

In the following cases involving determination of title and the right to distribution or partition under wills and deeds the presumption in favor of child-bearing capacity was held to be conclusive:

ARKANSAS:
Bowen v. *Frank*, 179 Ark. (2d) 1004 (1929)
GEORGIA:
Williams v. *Frierson*, 150 Ga. 797 (1921)
ILLINOIS:
Dustin v. *Brown*, 297 Ill. 499 (1921)
Hill v. *Sangamon Loan & Trust Co.*, 295 Ill. 619 (1920)
Hill v. *Spencer*, 196 Ill. 65 (1902)
INDIANA:
Burrell v. *Jean*, 196 Ind. 187 (1925)
KENTUCKY:
Futrell v. *Futrell's Executor*, 224 Ky. 814 (1928)
Rand v. *Smith*, 153 Ky. 516 (1913)
MARYLAND:
Williams v. *Armiger & Bro.*, 129 Md. 222 (1916)
NEW JERSEY:
Riley v. *Riley*, 92 N.J. Eq. 465 (1921)
PENNSYLVANIA:
Gowen's Appeal, 106 Pa. 288 (1884)
Sterrett's Estate, In re, 300 Pa. 116 (1930)
TENNESSEE:
Bigley v. *Watson*, 98 Tenn. 353 (1897)
Frank v. *Frank*, 153 Tenn. 215 (1925)
Jordan v. *Jordan*, 145 Tenn. 378 (1922)

The presumption was regarded as conclusive, except as otherwise noted, in the following cases involving the termination of trusts:

CALIFORNIA:

Fletcher v. *Los Angeles Trust & Savings Bank*, 182 Cal. 177 (1920)

DELAWARE:

Du Pont v. *Du Pont*, 159 Atl. 841 (1932)

FLORIDA:

Byers v. *Beddow*, 106 Fla. 166 (1932)

GEORGIA:

Dougan, In re, 139 Ga. 351 (1913)

KENTUCKY:

Allen v. *Allen's Trustee*, 141 Ky. 689 (1911)

Bailey's Trustee v. *Bailey*, 30 Ky. L. Rep. 127 (1906)

May v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136 (1912)

Quigley's Trustee v. *Quigley*, 161 Ky. 85, rehearing denied, 162 Ky. 754 (1914)

MARYLAND:

Ricard's Trust Estate, In re, 97 Md. 608 (1903)

MASSACHUSETTS:

Towle v. *Delano*, 144 Mass. 95 (1887)

NEW JERSEY:

Smith, Application of, 94 N.J.Eq. 1 (1922)

RHODE ISLAND:

Bowlin v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289 (1910)

TENNESSEE:

Bearden v. *White*, 42 S.W. 476 (1897)

Garner v. *Dowling*, 58 Tenn. 48 (1872)

Read v. *Fite*, 8 Humph. 328 (1847)

TEXAS:

Reeves v. *Simpson*, 182 S.W. 68 (1915)

WEST VIRGINIA:

Carney v. *Kain*, 40 W.Va. 758 (1895)

In the following cases it has been held that the presumption in favor of issue made it impossible for a vendor to convey clear title, and specific performance was denied:

ILLINOIS:

Weberpals v. *Jenny,* 300 Ill. 145 (1921).

KENTUCKY:

Aulick v. *Summers,* 186 Ky. 810 (1920).

Azarch v. *Smith,* 222 Ky. 566 (1928).

Brown v. *Owsley,* 198 Ky. 344 (1923).

MISSOURI:

Rozier v. *Graham,* 146 Mo. 352 (1898).

NORTH CAROLINA:

Shuford v. *Brady,* 169 N.C. 224 (1915).

PENNSYLVANIA:

List v. *Rodney,* 83 Pa. 483 (1877).

The following cases involved suits under acts providing for sale of land under special circumstances:

Apgar, In re, 37 N.J.Eq. 501 (1883)—Suit under statute permitting sale of land subject to contingent limitations; *held* that probability of incapacity at age 58 would not defeat the court's jurisdiction. Reversed on other grounds, *sub. nom. Apgar* v. *Apgar,* 38 N.J.Eq. 549.

Clement, In re, 57 Atl. 724 (N.J.).

Westhafer v. *Koons,* 144 Pa. 26 (1891)—Statute permitting sale of land subject to contingent remainder; *held,* in effect, that the contingency, although remote, formed the basis of the action.

In the following cases the presumption was discussed in connection with the determination of the intent of a testator.

Ansonia National Bank v. *Kunkel,* 105 Conn. 744 (1927)—*held* that the presumption that testatrix's sister might have chil-

dren, although aged 61 at the date of the will, cannot be used to show that the testatrix meant by "issue" of the sister issue of her body to the exclusion of an adopted child.

Oleson v. *Somogyi,* 93 N.J.Eq. 506 (1921)—lower court held that since the testatrix who had one child, was too old at the date of the will to have more, the words "next of kin", being plural, must have referred to persons other than the child. Affirmed on other grounds, the above statement being disapproved.

Flora v. *Anderson,* 67 Fed. 182 (C.C., S.D. Ohio.)—presumption held conclusive where it was sought to show that an illegitimate child of the daughter should take as "issue" because at the date of the will the daughter was 50 and had no legitimate children.

The presumption was also discussed in the following miscellaneous decisions:

Sims v. *Birden,* 197 Ala. 690 (1916), where the question was whether complainant was the daughter of X, who would have been 50 at the date of complainant's birth, and the court said there was no presumption of *incapacity* at age 50.

State v. *Lash,* 16 N.J.L. 380 (1838), where it was suggested that an action for adultery at common law could not be defeated by proof that the woman was past the age of procreation, since she would be presumed capable of bearing children until she died.

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